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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to consider a petition for writ of certiorari filed 273 days after entry of the court of appeals' original judgment, where the court of appeals refused to recall its mandate before accepting and denying an untimely petition for rehearing.

2. Whether a defendant is subjected to double jeopardy at his original sentencing hearing when, upon a jury verdict of felony murder, the trial judge imposes the death sentence based on the aggravating circumstance of "intentionally killing the victim while committing . . . rape . . .," where the state supreme court has held that the jury verdict was not an acquittal of knowing murder as a matter of state law.

3. Whether the Petitioner waived review of his collateral estoppel claim by failing to raise it in the lower courts.

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No. 92-7549

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

THOMAS N. SCHIRO, Petitioner,

v.

RICHARD CLARK, Superintendent, and
INDIANA ATTORNEY GENERAL Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The Petition for Writ of Certiorari is jurisdictionally out of time. The Petition was not filed within 90 days after the court of appeals' judgment of affirmance on May 8, 1992, as required by U.S. Sup. Ct. R. 13.1. The court of appeals refused to recall its mandate and lacked jurisdiction to consider the untimely petition for rehearing which it permitted to be filed instantar. Thus the time for seeking certiorari did not restart with the valid denial of a "timely petition for rehearing" under Rule 13.4.

STATEMENT OF THE CASE

Petitioner Thomas Schiro ("Schiro"), who was serving a suspended felony sentence at the Second Chance Halfway House in Evansville, Indiana, gained entrance to the home of Laura Luebbehusen on the pretext that he needed to use her telephone. He exposed himself, drank liquor, took drugs (and told

Luebbehusen to do so) and raped her three times. He then (by his own account) decided that he had to kill Luebbehusen so that she could not report the rapes.

Schiro hit Luebbehusen on the head with a vodka bottle until it shattered. She fought him, so he picked up an iron and beat her with it. Luebbehusen continued to fight until Schiro strangled her to death. He then performed vaginal and anal intercourse on the body.

Schiro was charged in three alternative counts with (1) "knowingly" killing another human being, Ind. Code § 35-42-1-1(1); (2) killing another human being while committing or attempting to commit rape, Ind. Code § 35-42-1-1(2); or (3) killing another human being while committing or attempting to commit criminal deviate conduct, *id.* At the guilt phase of the bifurcated trial Schiro raised an insanity defense.¹

The jury, using a verdict form which listed all three charged counts, found Schiro guilty as charged on Count II, felony murder while committing rape. The other counts on the form were left blank. After a sentencing hearing the jury recommended against the death sentence.

¹ Schiro apparently attempted to fool the jury into thinking he was mentally disturbed by rocking in his chair whenever they were in the courtroom. The trial judge, who observed that this behavior stopped when the jury was out, was not fooled (Pet. App. A-46). See also *Schiro v. State*, 479 N.E.2d 556, 559 (Ind. 1985), *cert. denied*, 475 U.S. 1036 (1986); *Schiro v. Clark*, 963 F.2d 962, 975 (7th Cir. 1992) (Pet. App. A-8).

The trial judge, who was not bound by the jury's recommendation, *see* Ind. Code § 35-50-2-9(e), sentenced Schiro to death. He found the following aggravating circumstance: "The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery." (Pet. App. A-44.) *See* Ind. Code § 35-50-2-9(b)(1) (Burns 1985). The trial court found no mitigating circumstances. (Pet. App. A-44 - A-47.)

In his second post-conviction petition in the state courts, Schiro argued that his conviction of felony murder constituted an acquittal of knowing murder, and that the trial judge's reliance on the "intentional[] killing" aggravating circumstance was double jeopardy. The Indiana Supreme Court, pointing out that neither felony murder nor murder is an included offense of the other under Indiana law, held that where the jury "finds the defendant guilty of one of the types of murder and remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider." *Schiro v. State*, 533 N.E.2d 1201, 1208 (Ind.), *cert. denied*, 493 U.S. 910 (1989) (Pet. App. A-42). The court also noted that Count I charged Schiro with *knowingly* killing, not *intentionally* killing, so the jury had not even considered the issue of whether Schiro had "intentionally" killed the victim. *Id.*

The district court denied federal habeas corpus relief, finding the Indiana Supreme Court's holding to be a

determination of state law binding on the federal courts. Schiro v. Clark, 754 F.Supp. 646, 660, 663 (N.D. Ind. 1990) (Pet. App. A-18, A-19).

The court of appeals agreed, holding that "[s]ince the jury's verdict did not amount to an acquittal under state law, the jury did not previously determine that Schiro did not intentionally murder Luebbehusen." Schiro v. Clark, 963 F.2d 962, 970 (7th Cir. 1992) (Pet. App. A-6). In a footnote the court noted that Schiro had not raised the separate collateral estoppel argument mentioned by Justice Stevens in his opinion respecting the denial of certiorari. 963 F.2d at 970 n.7 (Pet. App. A-6); see Schiro v. Indiana, 493 U.S. 910, 913-14 (1989) (Stevens, J.).

The judgment of the court of appeals affirming the district court's decision was entered on May 8, 1992 (Appendix 1a). The mandate issued on June 1, 1992 (App. 2a). On August 18, 1992, 102 days after judgment was entered, Schiro's counsel and Schiro pro se filed separate motions with the court of appeals. Each asked the court to recall its mandate and each tendered a petition for rehearing in banc with a request that it be accepted instanter. The Respondents opposed both motions.

On August 25, 1992, the court of appeals denied counsel's motion to recall the mandate but granted his motion to accept the petition for rehearing instanter (App. 3a). Schiro's pro se motions were denied. Counsel's petition for rehearing was denied on September 8, 1992 (Pet. App. A-10). The Petition for Writ of Certiorari was docketed in this Court

on February 5, 1993, the date to which Justice Stevens had extended the time for filing, but 273 days after the court of appeals' original judgment affirming the denial of habeas corpus relief.

SUMMARY OF ARGUMENT

I. Because the court of appeals refused to recall its mandate, it lacked jurisdiction to accept and rule on Schiro's untimely petition for rehearing. Thus there was no "timely petition for rehearing" which tolled Schiro's time to petition this Court for certiorari under U.S. Sup. Ct. R. 13.4, and his Petition is jurisdictionally out of time.

II. Schiro's double jeopardy claim is based on the unique facts of this case, as to which there is no split among the Circuits or even any prior determination of the point by another federal court. Other than his claim that the court of appeals erred, Schiro has presented no "special and important reasons" for review by this Court. U.S. Sup. Ct. R. 10.1.

Moreover, the question of whether the jury acquitted Schiro of intentional killing when it returned a verdict of felony murder is an issue of state law, the resolution of which by the Indiana Supreme Court is not reviewable by this Court. For the purposes of double jeopardy, the issue of whether multiple punishments can be imposed in a single trial is also a question of state law.

Schiro's argument that a bifurcated sentencing hearing is a second "trial" for double jeopardy purposes is unsupported

by this Court's precedents, which hold only that a second sentencing hearing after remand implicates the policies protected by the Double Jeopardy Clause. The sentencing phase is merely an extension of the trial, and the judgment does not become final until sentence is imposed. The allegation that the trial judge's conclusion was in some respect inconsistent with the jury's verdict on guilt does not implicate any federal constitutional question.

Schiro is not claiming that the jury's sentencing recommendation precluded the trial court's sentence based on intentional killing during a felony murder. Neither is he contending that the use of the felony murder aggravating circumstance violated the Eighth Amendment.

III. Schiro has waived his collateral estoppel claim by failing to present it in the lower courts.

The collateral estoppel issue is without merit in any event. As the Indiana Supreme Court found, the jury's silence on the "knowing" murder count did not determine the issue of whether Schiro "intentionally" killed the victim, and thus had no preclusive effect. Furthermore, the jury's verdict on guilt was not a "final judgment" for estoppel purposes because sentence had not yet been imposed.

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR WRIT OF CERTIORARI IS JURISDICTIONALLY OUT OF TIME.

The Petition was filed on February 5, 1993, the 273rd day after the court of appeals' judgment was entered on May 8, 1992. The Petition is timely only if its filing is calculated from the denial of a "timely petition for rehearing." U.S. Sup. Ct. R. 13.4. This determination depends upon the validity of the court of appeals' acceptance of Schiro's late petition for rehearing.

The court of appeals lacked jurisdiction to consider the late petition for rehearing because it expressly refused to recall its mandate which was issued on June 1, 1992. (App. 3a.) The issuance of a mandate divests a court of appeals of jurisdiction over an appeal, including jurisdiction to consider a petition for rehearing. Johnson v. Bechtel Associates, 801 F.2d 412, 415-16 (D.C. Cir. 1986); United States v. DiLapi, 651 F.2d 140, 144 (2nd Cir. 1981), cert. denied, 455 U.S. 938 (1982).

The Second Circuit suggested in DiLapi that a court of appeals need not reacquire jurisdiction to deny a petition for rehearing, 651 F.2d at 144 n.2, and in a later case further inferred that it need not recall the mandate to deny an extension of time to seek rehearing. Marino v. Ortiz, 888 F.2d 12, 13 (2nd Cir. 1989), cert. denied, 495 U.S. 931 (1990). This analysis begs the jurisdictional question, but does not apply here in any event because the court of appeals in this case granted the motion to accept the late petition for rehearing.

The fact that the court of appeals granted leave to file the late petition for rehearing does not mean that it should have recalled the mandate, for the standards are different. A mandate will be recalled "only in exceptional circumstances." Patterson v. Crabb, 904 F.2d 1179, 1180 (7th Cir. 1990) (recalling mandate where court of appeals mistakenly dismissed appeal, having overlooked final judgment); see also Zipfel v. Halliburton Co., 861 F.2d 565, 567 (9th Cir. 1988) (mandate will be recalled for "good cause" or to "prevent injustice" but only in exceptional circumstances); Johnson, 801 F.2d at 416 (mandate will be recalled only in "exceptional circumstances" and for "special reasons"); Greater Boston Television v. FCC, 463 F.2d 268, 277-80 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972).

The time for filing a petition for rehearing, on the other hand, may be enlarged merely upon a showing of "good cause," even if the time has expired. Fed. R. App. P. 26(b), 40(a). In the instant case the court of appeals apparently found "good cause" to allow the instanter filing of the petition for rehearing but could not find "exceptional circumstances" justifying the recall of its mandate.

The court of appeals failed to recognize, however, that its refusal to recall the mandate deprived it of jurisdiction to make any further ruling in the case. Thus its consideration and denial of the late petition for rehearing were void acts which had no effect on the timeliness of the Petition for Writ of Certiorari filed in this Court. Any other

holding would permit an unsuccessful appellant to restart the time for certiorari simply by presenting a late petition for rehearing for instanter filing.

The Petition should be dismissed for want of jurisdiction. If the Petition is granted, the Court will be required to decide as a threshold issue the question of whether a court of appeals retains jurisdiction to accept an untimely petition for rehearing without recalling its mandate.

II. SCHIRO'S DOUBLE JEOPARDY CLAIM DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE REVIEWED BY THIS COURT.

Schiro's primary claim is that the jury's choice of felony murder (Count II) at the guilt phase of his trial, and its silence on the count of "knowing" murder (Count I), constituted an acquittal of the latter. Thus he reasons that he was subjected to double jeopardy when, at the sentencing phase of the same trial, the state alleged and the trial judge found that he was eligible for the death sentence based on an aggravating circumstance which required a showing that he "intentionally" killed the victim during the course of a rape or criminal deviate conduct.

A. There Are No "Special And Important Reasons" To Review The Unique, Fact-Specific Issue Presented By The Petition.

This case presents unique facts. A ruling on the double jeopardy issue put forth by Schiro will affect only cases in which a defendant is charged with both intentional

murder and felony murder; in which the jury convicts of felony murder and is silent as to intentional murder; and in which the prosecution seeks the death sentence on the basis of an aggravating circumstance which includes an element of intentional killing.

There is no split among the Circuits on the issue, and in fact Schiro cites no other published decision in which the issue has arisen in a capital case.² He asserts simply that the court of appeals' decision departs from this Court's precedents, none of which (as explained below) are on point with the situation presented here.

In the absence of "special and important reasons" for this Court to review this case, the Petition should be denied.

B. The Meaning Of A Jury's Silence On One Count, And The Determination Of The Permissibility Of Multiple Punishments in a Single Trial, Are Issues of State Law.

1. The court of appeals, relying on prior circuit precedent as to which this Court denied review, held that the meaning of the jury's silence on Count I ("knowing" murder) is a matter of Indiana law. Schiro v. Clark, 963 F.2d at 970

² It is well settled in noncapital cases that double jeopardy is not violated by a sentencing court's reliance on a charges of which the defendant was acquitted. United States v. Rodriguez-Gonzalez, 899 F.2d 177, 179-81 (2nd Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 127, 112 L.Ed.2d 95 (1990); see United States v. Moreno, 933 F.2d 362, 374 (6th Cir.), cert. denied sub nom. Morris v. United States, ___ U.S. ___, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991).

(Pet. App. A-6), citing United States ex rel. Young v. Lane, 768 F.2d 834, 841 (7th Cir.), cert. denied, 474 U.S. 951 (1985). A state supreme court's determination of state law is binding on this and other federal courts. See Michigan v. Long, 463 U.S. 1032, 1038 n.4 (1983).

Schiro argues the Indiana Supreme Court was incorrect in its interpretation of Indiana law, and that a silent verdict on one count is the equivalent of acquittal on that count. See, e.g., Buckner v. State, 253 Ind. 79, 248 N.E.2d 348, 351 (1969). This general rule does not apply, however, where the "multiple counts were merely different charges of the same offenses." Cichos v. State, 246 Ind. 680, 208 N.E.2d 685 (1965). Significantly, this Court accepted this distinction and dismissed a previously granted writ of certiorari in Cichos v. Indiana, 385 U.S. 76, 79-80 (1966).

2. Invocation of the Double Jeopardy Clause does not alter the conclusion that this case is controlled by state law, because multiple punishments arising from a single trial implicate double jeopardy only where such punishments are not intended by the legislature. Missouri v. Hunter, 459 U.S. 359, 368 (1983). The state courts' determination of legislative intent in this regard is binding on the federal courts, including this Court. Id.

The Indiana Supreme Court has found, as a matter of Indiana law, that a jury's verdict of felony murder does not

preclude the sentencing judge from finding an intentional killing in support of a death sentence. This determination, unreviewable by a federal court, satisfies the Fifth Amendment's concern that the sentencing discretion of courts is confined to the limits established by the legislature. Jones v. Thomas, 491 U.S. 376, 381 (1989).

Schiro's bifurcated sentencing hearing was not a separate "trial" for double jeopardy purposes, and Schiro's argument to the contrary finds no support in this Court's precedents. The Court has found, of course, that a state may not make repeated attempts to sentence a defendant to death. Bullington v. Missouri, 451 U.S. 430 (1981); see Arizona v. Rumsey, 467 U.S. 203 (1984). But the Court has limited Bullington and Rumsey to resentencing hearings, Spaziano v. Florida, 468 U.S. 447, 458-59 (1984), and has never suggested that an original sentencing hearing places a defendant "in jeopardy" a second time as to issues litigated in the guilt phase of the same trial.

The original sentencing hearing is merely an extension of the trial and does not implicate the policies which lie behind prohibition of multiple trials. While these concerns of embarrassment, anxiety and expense are implicated by a second attempt to sentence a defendant to death, Bullington, 451 U.S. at 445, they are not present at the original sentencing hearing.

Schiro's "multiple-trial" argument also overlooks the settled principle that a judgment of conviction does not become final until the defendant is sentenced. Hopkins v. State, 420

N.E.2d 895, 896 (Ind. App. 1981); see Midland Asphalt v. United States, 489 U.S. 794, 798 (1989); Berman v. United States, 302 U.S. 211, 212 (1937). Thus Schiro was not subjected to double jeopardy so much as he was subjected to an internally inconsistent result from the jury (on guilt) and the judge (on sentence). Allegedly inconsistent verdicts, however, do not implicate any constitutional guarantee so long as the evidence supports them. United States v. Powell, 469 U.S. 57 (1984).³

3. Both the question of whether the jury's silence on Count I was an acquittal and the permissibility of multiple findings for double jeopardy purposes, are questions of Indiana law not reviewable by this Court. These questions of state law do not present important questions of federal law justifying the grant of a writ of certiorari. U.S. Sup. Ct. R. 10.1(c).

C. Even If The "Acquittal" Issue Were A Federal Question, It Is Clear That The Jury's Silence On The "Knowing" Murder Count Was Not An Implied Acquittal For Double Jeopardy Purposes.

Were this Court to hold that a bifurcated sentencing hearing is a multiple "trial" subject to the "implied acquittal" analysis of Green v. United States, 355 U.S. 184 (1957), the

³ In noncapital cases a sentencing judge is free to consider conduct of which the defendant has been acquitted. See cases cited supra at 10 n.2. At least one court has held that a sentencing judge is free to disagree with the jury's resolution of the case and enhance the sentence accordingly. United States v. Bryant, 892 F.2d 1466, 1470-72 (10th Cir. 1989), cert. denied, 496 U.S. 939 (1990).

result in this case would still be the same. Unlike the verdict in Green, the verdict in the instant case was not a choice between two different offenses, but instead represented a choice between two different theories of culpability for the same offense.

Ind. Code § 35-42-1-1 does not define different crimes, but simply defines different theories under which a defendant may be found guilty of murder. See, e.g., Schad v. Arizona, 501 U.S. ___, 111 S.Ct. 2491, 2499-500, 115 L.Ed.2d 555 (1991). Based on this distinction, at least one federal court has held that where a jury convicted a defendant of premeditated murder but was silent on felony murder, he had not been impliedly acquitted of felony murder under Green. Thus retrial on both counts and a resulting conviction of felony murder did not violate the Double Jeopardy Clause. United States ex rel. Jackson v. Follette, 462 F.2d 1041 (2d Cir.), cert. denied, 409 U.S. 1045 (1972).

The holding in Poland v. Arizona, 476 U.S. 147 (1986), supports this reasoning. Poland held that a resentencing does not violate the Double Jeopardy Clause as interpreted in Bullington where the defendant received a death sentence at the first hearing but the trial court's application of aggravating circumstances was erroneous. The Court held that while a defendant can be "acquitted" of the death penalty by receiving a life sentence at the first hearing, one cannot be "acquitted" of a particular aggravating circumstance. If a defendant cannot be "acquitted" of a particular aggravating circumstance

in multiple hearings, it follows that he cannot be "acquitted" of a single element of an aggravating circumstance.

Because the result of this case would be no different even under the analysis suggested by Schiro, this Court should not expend its limited resources to render an advisory opinion leading to the same result reached by the lower courts.

D. Schiro Is Not Contending That The Trial Judge's Rejection Of The Jury's Sentence Recommendation Violated Double Jeopardy, Nor Is He Raising A Claim Under The Eighth Amendment.

1. Schiro's contentions in this Court are based solely on the jury's verdict at the guilt phase of his trial, not the jury's recommendation that he receive a life sentence. (Petition at 8-9.) His contention that the jury's sentencing recommendation had independent significance was correctly rejected by the lower courts on the basis of Spaziano v. Florida, 468 U.S. 447 (1984), and has not been raised here.

The court of appeals clearly treated these claims separately, and did not rely on Spaziano in analyzing the effect of the jury's verdict of guilt. Schiro v. Clark, 963 F.2d at 970-71 (Pet. App. A-6). Nothing in the court of appeals' opinion suggests that it "assum[ed] that Spaziano somehow preempts all other constitutional provisions," as Schiro rather unfairly charges. (Petition at 9.)

2. Schiro's "acquittal" arguments throughout this case have been based on the Double Jeopardy Clause of the Fifth Amendment. Schiro is not claiming that the use of the felony

murder aggravator violated the Eighth Amendment. Thus this case does not raise or have implications for the issue now before the Court in Tennessee v. Middlebrooks, No. 92-989, cert. granted, 113 S.Ct. ____ (April 19, 1993); see 61 U.S.L.W. 3526 (summary of petition for writ of certiorari); see also State v. Middlebrooks, 840 S.W.2d 317, 341-47 (Tenn. 1992).

III. SCHIRO WAIVED HIS COLLATERAL ESTOPPEL CLAIM BELOW, AND THE ISSUE DOES NOT RAISE AN IMPORTANT FEDERAL QUESTION IN ANY EVENT.

1. Schiro's independent claim that the jury's silence on "knowing" murder estopped the state from seeking the death penalty on the basis of intentional killing was not raised in the lower courts. It is not mentioned in any of the state court opinions or the decision of the federal district court. The court of appeals pointed out in a footnote that Schiro had not raised the collateral estoppel argument mentioned by Justice Stevens in his opinion respecting the denial of certiorari. 963 F.2d at 970 n.7 (Pet. App. A-6); see Schiro v. Indiana, 493 U.S. 910, 913-14 (1989) (Stevens, J.).

This Court will not grant certiorari to review issues neither raised in nor ruled upon by the lower courts. See Berkemer v. McCarty, 468 U.S. 420, 443 (1984); Delta Air Lines v. August, 450 U.S. 346, 362 (1981).

2. The collateral estoppel claim is without merit in any event. Estoppel applies when an issue of ultimate fact has been determined by a valid and final judgment. Ashe v. Swenson, 397 U.S. 436, 443 (1970). For two reasons, the jury's silent

verdict on Count I in this case does not meet this test.

First, the jury's silence on Count I did not determine the issue of intent. As has been noted above, the jury's finding that Schiro was guilty of felony murder did not, as a matter of Indiana law, constitute a determination that he was innocent of knowing murder. Moreover, the Indiana Supreme Court held that the jury, in deciding whether Schiro was guilty of "knowingly" killing the victim under the murder statute, was not presented with the issue of whether he "intentionally" killed the victim for the purposes of the aggravating circumstance. Schiro v. State, 533 N.E.2d at 1208 (Pet. App. A-42).

Second, the jury's verdict on guilt was not a "final judgment" under Indiana law because Schiro had not yet been sentenced. Hopkins v. State, 420 N.E.2d 895, 896 (Ind. App. 1981); see Midland Asphalt v. United States, 489 U.S. 794, 798 (1989); Berman v. United States, 302 U.S. 211, 212 (1937). Thus the trial judge was not legally precluded from finding, on the basis of his independent review of the facts, that Schiro intentionally killed the victim during the felony murder of which the jury had found Schiro guilty.

This Court has held that a defendant's "substantial participation" in a felony murder may justify imposition of the death penalty notwithstanding the fact that the evidence does not support a verdict of intentional or premeditated murder. Tison v. Arizona, 481 U.S. 137 (1987). Indiana has addressed this concern by imposing the death penalty only where a killing in the course of a felony murder was intentional. Schiro asks

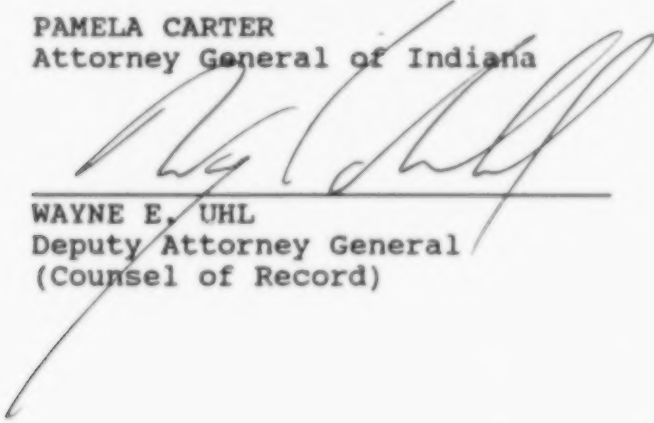
the Court to undermine both Tison and Indiana's salutary efforts by holding that whenever a jury chooses felony murder in lieu of premeditated or knowing murder, the trial court is precluded from imposing a death sentence based on clear proof that the killing was intentional.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PAMELA CARTER
Attorney General of Indiana



WAYNE E. UHL
Deputy Attorney General
(Counsel of Record)

April 22, 1993

APPENDIX

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: May 8, 1992

BEFORE: Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable HARLINGTON WOOD, JR., Circuit Judge*
Honorable FRANK H. EASTERBROOK, Circuit Judge

No. 91-1509

THOMAS SCHIRO,
v. Petitioner - Appellant

RICHARD CLARK, Superintendent and INDIANA ATTORNEY GENERAL,
Respondents - Appellees

Appeal from the United States District Court for the
Northern District of Indiana, South Bend Division
No. 83 C 588, Judge Allen Sharp

This cause was heard on the record from the above mentioned
District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this
court that the judgment of the District Court is **AFFIRMED**,
in accordance with the decision of this court entered this date.

*Judge Wood, Jr., assumed senior status on January 16, 1992, which was
after oral argument in this case.
(1061-030690)

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

NOTICE OF ISSUANCE OF MANDATE

DATE: June 1, 1992

TO: Geraldine J. Crockett
United States District Court
Northern District of Indiana
Room 102
South Bend Division
102 Federal Building
South Bend, IN 46601

FROM: Thomas, F. Strubbe, Clerk

RE: 91-1509
Schiro, Thomas v. Clark, Richard
83 C 588, Judge Allen Sharp

Herewith is the mandate of this court in this appeal, along with the
Bill of Costs, if any. A certified copy of the opinion/order of the
court and judgment, if any, and any direction as to costs shall constitute
the mandate.

[] No record filed
[x] Original record on appeal consisting of:

ENCLOSED:	TO BE RETURNED AT LATER DATE:
[] Volumes of pleadings	[2]
[] Loose pleadings	[]
[] Volumes of transcripts	[1]
[] Volumes of State Court pleadings	[16]
[] Volumes of State Court briefs	[7]
[] Volumes of State Court loose pleadings	[6]
[] Other _____	[]
Record being retained for use in Appeal No. _____	[]

Copies of this notice sent to: Counsel of record
[] United States Marshall
[] United States Probation Office

NOTE TO COUNSEL:

If any physical and large documentary exhibits have been filed in
the above-entitled cause, they are to be withdrawn ten days from the date of
this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy
of this notice.

Received above mandate and record, if any, from the Clerk, U.S.
Court of Appeals for the Seventh Circuit.

Date: _____
(1071-010891)

Deputy Clerk, U.S. District Court

United States Court of Appeals ^{CS}

For the Seventh Circuit
Chicago, Illinois 60604

August 25, 1992

By the Court:

THOMAS SCHIRO,]	Appeal from the United
Petitioner-Appellant,]	States District Court for
]	the Northern District of
No. 91-1509	v.	Indiana, South Bend
]	Division.
RICHARD CLARK, Superintendent and]	
INDIANA ATTORNEY GENERAL,]	No. 83 C 588
Respondents-Appellees.]	Allen Sharp,
]	Chief Judge.
]	

This matter comes before the court for its consideration of the following documents:

1. MOTION TO RECALL MANDATE filed herein on 8/18/92, by counsel for the appellant.
2. MOTION TO ACCEPT PETITION FOR REHEARING IN BANC INSTANTER filed herein on 8/18/92, by counsel for the appellant.
3. VERIFIED PETITION TO RECALL THE MANDATE AND PERMIT THE FILING OF A PETITION FOR REHEARING AND SUGGESTION FOR AND REHEARING IN BANC OUT OF TIME filed herein on 8/18/92, by the pro se appellant.
4. RESPONSE TO MOTIONS TO RECALL MANDATE AND ACCEPT PETITION FOR REHEARING INSTANTER filed herein on 8/25/92, by counsel for the appellees.

On consideration thereof,

IT IS ORDERED that the Motion to Recall the Mandate is DENIED.

IT IS FURTHER ORDERED that the Motion to Accept Petition for Rehearing in Banc Instanter is GRANTED and the clerk of this court is directed to file as of 8/21/92 the petition for rehearing tendered by appointed counsel for the appellant.

IT IS FURTHER ORDERED that the Verified Petition to Recall the Mandate and Permit the Filing of a Petition for Rehearing and Suggestion for and Rehearing in Banc Out of Time is DENIED.



STATE OF INDIANA
OFFICE OF THE ATTORNEY GENERAL
INDIANA GOVERNMENT CENTER SOUTH, FIFTH FLOOR
402 WEST WASHINGTON STREET • INDIANAPOLIS, IN 46204-2770
TELEPHONE (317) 232-6201

April 22, 1993

ATTN: Mr. Chris Vasil, Deputy Clerk
Supreme Court of the United States
One First Street, N.E.
Washington DC 20543

Re: No. 92-7549, Schiro v. Clark

Dear Mr. Vasil:

Enclosed please find 13 copies of Brief in Opposition to Petition For Writ of Certiorari in the above case, with Certificate of Service.

Please file the Brief with the Court and return a file-marked copy of the Petition and the Certificate to me in the enclosed self-addressed and stamped envelope.

Thank you for your assistance and cooperation in this matter.

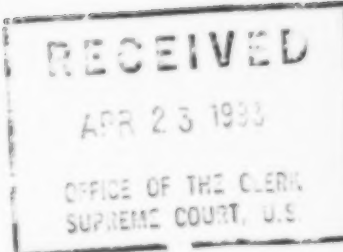
Very truly yours,

Wayne E. Uhl
Deputy Attorney General

WEU:mmi:WPP

Enclosures.

cc: Ms. Monica Foster



No. 92-7549

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

THOMAS N. SCHIRO, Petitioner,


v.

RICHARD CLARK, Superintendent, and
INDIANA ATTORNEY GENERAL, Respondents.

CERTIFICATE OF SERVICE

I, Wayne E. Uhl, a member of the Bar of this Court, hereby certify that one copy of the Brief in Opposition to Petition for Writ of Certiorari in this case was served upon counsel of record listed below by U.S. mail, first-class postage prepaid, on this the 22 day of April, 1993, and that all parties required to be served have been served:

Monica Foster
HAMMERLE & FOSTER
500 Place
501 Indiana Ave., Ste. 200
Indianapolis IN 46202


Wayne E. Uhl
Deputy Attorney General
Counsel for Respondents

Office of Attorney General
219 State House
402 W. Washington St.
Indianapolis, Indiana 46204-2794
Telephone: (317) 232-6333
WEU:mmi:WPP

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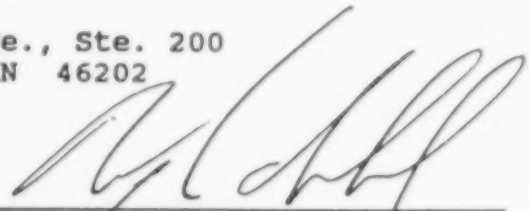
v.

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October Term, 1992

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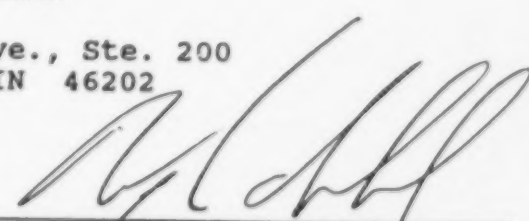
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